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Supreme Court of the United States

OCTOBER TERM, 1947

EDWARD K. BARSKY, ET AL.,
Petitioners,
against
UNITED STATES OF AMERICA.

No. 766.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

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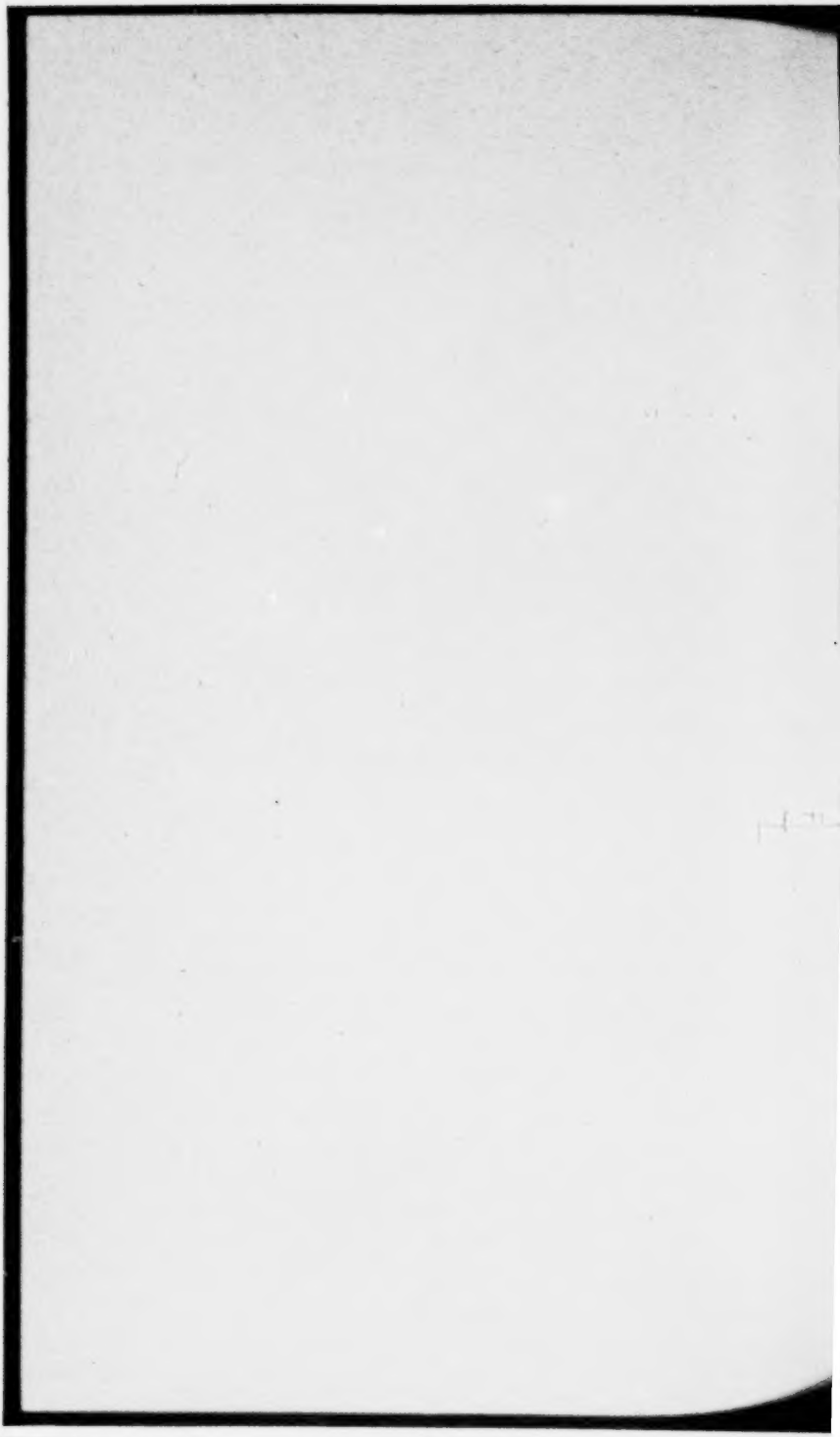
17



INDEX

PAGE

STATEMENT 1

CONCLUSION 10

Table of Cases Cited

Ballard *v.* United States, 322 U. S. 78 7

Barry *v.* United States ex rel. Cunningham, 279 U. S. 597, 614 3

Baumgartner *v.* United States, 322 U. S. 665 6

Colonial Sugar Refining Company *v.* Attorney General, 15 C.L.R. 182 7

DeJonge *v.* Oregon, 299 U. S. 353 6

Herndon *v.* Lowry, 301 U. S. 442 6

Illinois ex rel. McCollum *v.* Board of Education, 333 U. S. 203 5-6

Interstate Commerce Commission *v.* Goodrich Transit Company, 224 U. S. 194, at 211 4

Jurney *v.* MacCracken, 294 U. S. 195 3

Kilbourn *v.* Thompson, 103 U. S. 168 3

McGrain *v.* Daugherty, 273 U. S. 135 3

Murdock *v.* Pennsylvania, 319 U. S. 105 5

Musser *v.* Utah, 333 U. S. 95 8

Reed *v.* County Commissioners of Delaware County, 277 U. S. 376, 388 3

PAGE

Schneiderman *v.* United States, 320 U. S. 118 6
Shelley *v.* Kraemer, decided May 3, 1948 3
State *v.* Diamond, 27 New Mexico 477 9
State *v.* Klapprott, 127 N. J. Law 395 9
Stromberg *v.* California, 283 U. S. 359 6

Taylor *v.* Mississippi, 319 U. S. 583 9
Thomas *v.* Collins, 323 U. S. 516 5
Thornhill *v.* Alabama, 310 U. S. 88, 97, 98 6

West Virginia State Board of Education *v.* Barnett, 319 U. S. 624 7
Winters *v.* New York, decided March 29, 1948 ..... 6, 8, 9

Statutes, Commentaries, Etc., Cited

Legislative Reorganization Act of 1946, Rule XI(q)i 2

United States Code, Title 2, Section 192 2

United States Constitution:
First Amendment 2, 3, 7, 9
Fifth Amendment 2, 3, 8, 9

House Resolution No. 282, 75th Congress, 83 Congressional Record 7568 2

May, "Constitutional History of England," vol. 2, pp. 38-41 8

Ogden, "The Dies Committee" 7

47 Columbia Law Review 416 7

60 Harvard Law Review 1193 7

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BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

The American Civil Liberties Union is a non-partisan, nationwide organization whose members, though of different political beliefs, are united in a devotion to the principles of the Bill of Rights. The Union engages in no political campaigns and has no political credo save that found in the Constitution. It has no affiliation of any kind, formal or otherwise, with the organization which petitioners here are charged with membership in.

This brief is submitted in support of the petition for certiorari with the consent of the parties. The American Civil Liberties Union is interested in this case because it believes that it presents far-reaching problems of the powers of congressional committees in the field of freedom of speech and of assembly, matters which have for many years been among the prime concerns of the American Civil Liberties Union.

The facts are adequately stated in the petition for certiorari and need not be repeated here, except to state that the issue arises on conviction under Section 192 of Title 2 of the United States Code for refusing to produce subpoenaed records before a committee of Congress. With many of the points raised in the petition we are not concerned. We are interested only in the basic question of the validity of the resolution which established the committee in question under the First and Fifth Amendments to the Constitution.

The committee in question, then the Special Committee on Un-American Activities of the House of Representatives, was originally established by House Resolution No. 282 of the 75th Congress, 83 Congressional Record 7568. It was reenacted without change at succeeding sessions of the Congress and embodied substantially without change in the Legislative Reorganization Act of 1946 which for the first time established the committee as a Standing Committee of the House, being Rule XI(q)i.

The purposes of these various committees are:

> "To make from time to time investigations of (1) the extent, character and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of domestic origin and attacks the principle of the form of government as guaranteed by our Constitution."

Petitioners having been summoned to appear before the Committee and produce certain records did appear and answer questions but refused to produce the records. They have contended that the creation of the Committee constituted an abridgement of freedom of speech and of assembly

as guaranteed by the First Amendment and violated the due process clause of the Fifth Amendment because of the vagueness of the terms of reference. This vagueness of the terms of reference affects also the argument under the First Amendment.

In the Court of Appeals for the District of Columbia the convictions were upheld, Judge Edgerton dissenting. We believe that his dissenting opinion forcefully develops the constitutional arguments on behalf of petitioners and that the opinion of the majority fails to meet the arguments advanced in that dissent. There are, however, certain further observations which we think pertinent and which may be helpful to this Court in its consideration of the problem.

1. It is, of course, clear that no arm of government is immune from restraints imposed by the Constitution. This Court has but recently affirmed this principle so far as the judiciary is concerned. See *Shelley* v. *Kraemer,* decided May 3, 1948. That the power of a legislative committee is likewise subject to constitutional restriction was decided in *Kilbourn* v. *Thompson,* 103 U. S. 168.

See also:

McGrain v. *Daugherty,* 273 U. S. 135;
Jurney v. *MacCracken,* 294 U. S. 195.

Specifically this Court has held that such inquiry must relate to matters within the constitutional authority of Congress.

See:

Reed v. *County Commissioners of Delaware County,* 277 U. S. 376, 388;
Barry v. *United States ex rel. Cunningham,* 279 U. S. 597, 614.

The first question to be considered in any particular case, therefore, is whether the general subject matter concerning which the committee of Congress is authorized to make an investigation is a subject matter with which Congress can constitutionally deal. That requires a study of the resolution creating the particular committee and the activities of the committee acting under the resolution insofar as these throw light on the meaning of the resolution itself.

The majority of the Court of Appeals appears to have dealt with this case on the assumption that investigation may be proper of a subject matter although Congress might not have power to legislate with regard to it, citing in support of that proposition *Interstate Commerce Commission* v. *Goodrich Transit Company,* 224 U. S. 194, at 211. The fallacy of reliance on that case is readily apparent if the problem is couched in language more germane to the present situation. It is clear, of course, as repeated decisions of this Court have indicated, that Congress under the commerce clause can in many situations deal with commerce wholly intrastate because of the impact of such commerce on that which is interstate. For that reason in any inquiry dealing with interstate commerce, many subjects can be looked into which affect local commerce only. Without such inquiry Congress might not properly be able to legislate concerning the interstate commerce itself. Nevertheless, we venture to suggest that no court would uphold an unrestricted investigation by a Congressional committee or federal agency into the entire commerce of the country. Such a resolution would clearly be beyond the power of Congress and could not be supported by the argument that some information with regard to interstate commerce would be obtained or that some of the local matters inquired into might lead to appropriate legislation with regard to

interstate commerce. On the other hand, a resolution authorizing an inquiry into any particular aspect of interstate commerce might in a particular setting permit questions to be asked about local commerce because of the impact of such commerce on that which moved across state lines.

So, in the present situation, we submit that no general inquiry into matters relating to opinion or affecting freedom of association is permissible although in an inquiry properly limited to matters concerning which Congress could constitutionally legislate, questions might be asked of a broader scope if the relevancy of the questions to the particular inquiry appeared.

Particularly do we submit that such should be the rule where the resolution creating the inquiry uses terms of reference so vague as to be legally without meaning.

2. It can hardly be disputed that the resolution here in question invades areas protected by the First Amendment. This Court has been in recent years particularly astute to protect freedom of speech, freedom of religion and freedom of assembly from all kinds of encroachment by the Congress or the states. In so doing it has declared that these rights are preferred and that the usual presumption of constitutionality in favor of legislative acts should not be indulged in when these rights are involved.

This Court has not restricted its concern to cases where there was a direct interference with those great freedoms, but has struck down any attempts to impinge upon them by indirection. In *Murdock* v. *Pennsylvania,* 319 U. S. 105, it held void municipal ordinances which sought to apply an ordinary and insignificant license tax to sales of religious pamphlets. In *Thomas* v. *Collins,* 323 U. S. 516, it struck down an attempt to limit certain kinds of speech by registration requirements. In *Illinois ex rel. McCollum* v. *Board*

of Education, 333 U. S. 203, this Court held to be a violation of separation between Church and State any use of school buildings for sectarian purposes.

The Court has also shown concern over the right of assembly, repudiating the doctrine of guilt by association.

See:

DeJonge v. *Oregon,* 299 U. S. 353;
Schneiderman v. *United States,* 320 U. S. 118;
Baumgartner v. *United States,* 322 U. S. 665.

This Court has been particularly concerned where the attack on freedom was couched in vague terms.

See:

Stromberg v. *California,* 283 U. S. 359;
Herndon v. *Lowry,* 301 U. S. 442.

These views were recently reiterated in *Winters* v. *New York,* decided March 29, 1948.

While it is true that in most of the cases above cited the challenged governmental action was embodied in a law which forbade action, it is submitted that the same principle is applicable to a resolution of inquiry as the result of which criminal sanctions may be imposed.

For the essential reason for the striking down of these laws, particularly where they are vague ones, was expressed by Mr. Justice Murphy in *Thornhill* v. *Alabama,* 310 U. S. 88, 97, 98, where he said:

> **"It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."**

The question in every case must be whether or not the governmental action involved is a threat to any of the freedoms guaranteed by the First Amendment.

We believe that there can be no doubt but that the inquiry authorized by this resolution constitutes such a threat. On its face and as it has been applied by the actions of the Committee during its many years of existence, the purpose of the Committee has been primarily to bring into popular disfavor those persons and those ideas which the majority of the Committee (or sometimes even only a single member of it) thought undesirable. The activities of this Committee have been canvassed by many persons. We call attention primarily to the note which appeared in 47 Columbia Law Review 416, to the discussion of the Committee's treatment of the Southern Conference on Human Welfare by Professor Gellhorn in 60 Harvard Law Review 1193, and to Ogden "The Dies Committee".

In effect Congress has by the creation of this Committee authorized the compulsory disclosure, under penalty of prison sentence, by anyone of any opinion, political, social, religious or otherwise, which the Committee thought might have some relation to the vague and general subject matter of its inquiry. We submit that this may not constitutionally be done. See *West Virginia State Board of Education* v. *Barnett,* 319 U. S. 624; *Ballard* v. *United States,* 322 U. S. 78.

More serious, perhaps, than the compulsory disclosure of opinion is the threat which the mere existence of such a committee has on the expression of opinion and the conduct of wholly legal activities throughout the nation.

In closing, we wish to call attention to the statement of the High Court of Australia in *Colonial Sugar Refining Company* v. *Attorney General,* 15 C.L.R. 182. There it

had been suggested that the power to initiate a Constitutional Amendment authorized inquiry into a subject matter otherwise closed. This argument was rejected in the following language:

> "If it is sound every inhabitant of the Commonwealth is liable to an inquisitional investigation conducted under the federal power as to his most intimate private affairs."

3. All of the foregoing considerations are particularly relevant here because of the vagueness of the terms of reference. The terms used in the resolution are "un-American" and "subversive." There is also reference to attacks on "the principle of the form of government as guaranteed by our Constitution."

It can hardly be disputed that if this had been a statute directly punishing propaganda or activities of the kind described it would be void under the Fifth Amendment. See *Musser* v. *Utah*, 333 U. S. 95, and *Winters* v. *New York*, decided March 29, 1948. In the last case Mr. Justice Reed said:

> "Statutes which include prohibitions of acts fairly within the protection of a free press are void."

This resolution clearly covers within its scope all kinds of wholly lawful propaganda, if indeed it is in any way directed at unlawful propaganda. For there is nothing in the term "un-American" which connotes illegality. Nor can it be said that attempts to change the fundamental character of the Constitution are illegal. Even the word "subversive" does not necessarily connote violation of law. It must not be forgotten that not much more than a century ago there were judges who declared that it was subversive to advocate universal suffrage. See May, "Constitutional History of England," vol. 2, pp. 38-41.

Aside from the fact that the resolution is aimed at wholly lawful matters, it is clear also that its scope is so broad that no one can determine whether or not a particular inquiry properly comes within the terms of reference. As has been elaborately demonstrated in petitioners' brief and in the various analyses of the work of this Committee, no meaning whatever has been ascribed to its terms. While the word "subversive" might be susceptible of an interpretation which would limit it to activities by unlawful means, the fact is that that word has not been so restricted. The word "un-American" is inherently incapable of definition for it reflects merely the prejudices of the moment. Any number of things now accepted as commonplaces, such as the income tax, unemployment insurance, social security, have been at one time or another declared to be un-American. It is an epithet, a term of opprobrium, not a term of legal art.

In the *Winters* case this Court referred with approval to the decision in *State* v. *Diamond,* 27 New Mexico 477, where a law was held void because it made no distinction between lawful and unlawful advocacy of change of government.

See also:

State v. *Klapprott,* 127 N. J. Law, 395.

Indeed this Court in *Taylor* v. *Mississippi,* 319 U. S. 583, struck down a Mississippi law which punished the distribution of literature "calculated to encourage disloyalty".

Whether the matter be viewed merely under the due process clause of the Fifth Amendment or in the broader context of the First Amendment, the result is inescapable that here is a threat to all freedom of speech and of association, because no one can determine whether he comes within its terms or not.

It will not do to brush this argument aside, as did the majority of the Court of Appeals, by the reference to the *Sinclair* case (279 U. S. 263) that the accused was bound rightly to construe the statute—that is, the statute requiring testimony. In that case, no question of the meaning of the resolution establishing the committee was involved. The only argument made was that the refusal to answer had been based upon advice of counsel given in good faith. That is a far different situation from the one here presented, where the contention is that no one can determine whether or not he comes within the scope of the inquiry because of the vagueness of its terms of reference. The same considerations affect such a situation as when a person is called on to determine whether or not contemplated action is illegal.

CONCLUSION

It is respectfully submitted that this case presents questions of such far-reaching importance that it should be reviewed by this Court.

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